In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-771

HECKETHORN MANUFACTURING CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

On October 27, 1972, the National Labor Relations Board conducted a representation election among the production and maintenance employees at the petitioner Company's munitions plant in Dyersburg, Tennessee (Pet. App. D, p. A-9). The Union[1] lost the election and filed timely objections and unfair labor practice charges based on the Company's pre-election campaign. After a hearing before an Administrative Law Judge, the Board found that the Company had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by coercively interrogating employees and by threatening them

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[1]International Union, United Automobile, Aerospace & Agricultural Implement Workers of America.

with job loss because of their union activities (Pet. App. C, p. A-4; Pet. App. D, pp. A-14 to A-17). The Board set aside the election, directed a second one and entered an appropriate remedial order (Pet. App. C, pp. A-5 to A-6).

The unfair labor practice conduct relating to coercive interrogation involved two separate requests by Production Manager Robert Strickland to employee Fannie Mae Johnson that she "silence" pro-union employees, three requests by Strickland that Johnson ascertain and report to Strickland the union sympathies of other employees (Pet. App. D, pp. A-14 to A-15), and interrogations of employees Clark and Rigsby by Foremen Simpson and Whittle, respectively (Pet. App. D, pp. A-15 to A-16, A-17). The unfair labor practice conduct relating to threats of job loss involved warnings by Quality Control Manager Marvin Early to employee Danny Ing that the Company would do as much for the employees as it could, but "[i]f the union came in, he guaranteed there wouldn't be any jobs" (Pet. App. D, pp. A-16 to A-17).

The court of appeals found substantial evidence supporting the Board's findings of unfair labor practices and enforced its order, except with regard to the interrogations of employees Clark and Rigsby (Pet. App. B, pp. A-2 to A-3).[2]

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[2]In concluding that there was substantial evidence to support the Board's finding of violations of Section 8(a)(1) and granting enforcement of the Board's order, the court stated that it found "no coercive interrogation in the conversations between foreman Simpson and employee Clark or supervisor Whittle and employee Rigsby which were relied upon in part by the Administrative Law Judge and the Board" (Pet. App. B, pp. A-2 to A-3).

1. Petitioner contends (Pet. 8-9) that Strickland's interrogation of Johnson did not violate the Act because there was no showing that the interrogation actually restrained or coerced Johnson. However, the ultimate test of a Section 8(a)(1) violation is not whether "any employee was in fact intimidated or coerced by the [employer's] statements" (*National Labor Relations Board* v. *Electric Steam Radiator Corp.*, 321 F.2d 733, 736 (C.A. 6)), but whether the employer's conduct "tends to interfere with the free exercise of employee rights under the Act." *National Labor Relations Board* v. *Ford*, 170 F.2d 735, 738 (C.A. 6). *National Labor Relations Board* v. *Welsh Industries, Inc.*, 385 F.2d 538 (C.A. 6), upon which petitioner relies (Pet. 8), is not to the contrary, for the court in *Welsh* did not hold that an interrogation must actually coerce, but only that "[t]o offend the Act, interrogation must rise to the level of coercion or restraint." *Id.* at 540.

Accordingly, the only issue actually presented is whether substantial evidence supports the Board's finding that the interrogation of employee Johnson tended to be coercive. That issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, there is ample support in the record for the Board's finding (Pet. App. D, pp. A-14 to A-15).[3]

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[3]Petitioner's factual assertions (Pet. 6, 8-9) concerning the interrogation, *e.g.*, employee Johnson's alleged initiation of the incidents and her hostility to the Union, are based on the discredited testimony of Strickland, which the Administrative Law Judge found "[did] not ring true" (Pet. App. D, p. A-15).

2. There is no substance to petitioner's contention (Pet. 9-10) that the finding that Ing was unlawfully threatened was based on his understanding of Manager Early's words, rather than on an evaluation of the words themselves. The Board found that Early stated to Ing that "[i]f the Union came in he guaranteed there wouldn't be any jobs" (Pet. App. D, p. A-16). These words may properly be found to be coercive without regard to the employee's understanding of them. For, while an employer may

> make a prediction as to the precise effects he believes unionization will have on his company * * *, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

National Labor Relations Board v. *Gissel Packing Co.*, 395 U.S. 575, 618.

Here, there was no objective basis for asserting that the employees would lose thier jobs because of forces beyond the Company's control. Nor was there evidence that management had already arrived at a decision to close or move the plant. Accordingly, the Board properly concluded that Early's statements to Ing constituted threats of job loss and thus violated the Act.[4] See *Amalgamated Clothing*

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[4]The Administrative Law Judge's comment on employee Ing's "understanding" of Early's statement follows a recital of the circumstances which support his finding that the statement could reasonably be deemed to constitute a threat of job loss (Pet. App. D, pp. A-16 to A-17). Moreover, as the Court has recognized, employees "are particularly sensitive to rumors of plant closings, [and] take such hints as coercive threats rather than honest forecasts." *National Labor Relations Board* v. *Gissel Packing Co.*, *supra*, 395 U.S. at 619-620 (footnotes omitted).

Workers v. *National Labor Relations Board*, 424 F.2d 818, 825-826 (C.A. D.C.); *National Labor Relations Board* v. *J.H. Rutter Rex Manufacturing Co.*, 415 F.2d 1133, 1135 (C.A. 6).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
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National Labor Relations Board.

FEBRUARY 1975.